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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1153

PAUL BANKS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Banks, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on April 22, 1965.

A. The Opinion Below

The above case was affirmed without opinion.

B. Jurisdiction

The judgment of the Court of Appeals was entered on April 22, 1965.

A stay of the mandate was granted on the 4th day of May, 1965, in the Second Circuit Court of Appeals. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Question Presented

The question specifically raised by the petitioner, Paul Banks, is:

SHOULD THE GOVERNMENT BE OBLIGATED TO PRODUCE AS A WITNESS A SPECIAL EMPLOYEE-INFORMER WHOSE IDENTITY HAS ALREADY BEEN DIVULGED?

D. United States Constitution and the Statutes

The statutes involved are: United States Code, Title 21, Sections 173, 174.

E. Summary Statement of Matters Involved

On March 5, 1964, the defendant, Paul Banks, was arrested on Columbus Avenue and 67th Street, New York, New York. As a result of this arrest he was charged with the possession of a small amount of narcotic drugs allegedly taken from a waste basket near the scene of his arrest. He was arraigned the following day and charged with the sale of narcotics.

The trial commenced August 11, 1964, charging Banks with two sales of narcotics on the 14th and 21st of November, 1963, respectively, and for the possession of narcotics drugs on March 5, 1964. The jury acquitted the defendant on the possession charge and found him guilty on both sale counts.

The government's main witness against the defendant was Joseph Vincent Casale, a narcotic agent of the Federal Bureau of Narcotics. He testified that on November 14, 1963, at about 6:25 P.M. he went to the Dorado Hotel with the informant of the Bureau of Narcotics, later identified as Lloyd Crider. At that time they met a woman identified as Edrienna Robinson. About 7:25 P.M. the defendant entered and, in a matter of seconds (111 R), the alleged narcotic transaction took place. At approximately 7:40 P.M. Agent Casale returned to 62nd Street and Broadway.

On November 21st, at 12:05 A.M. Agent Casale and the informant met the defendant in front of 332 West 51st Street and, with almost no conversation, an alleged narcotic transaction took place. On both occasions the informer was present and an active participant (66, 75, 96, 97 R). The surveilling agents verified that the defendant Banks was in the vicinity on these days. The defendant Banks took the stand and admitted being in the vicinity in question but emphatically denied making any sales of narcotics. The defendant's allegation was that, if a sale was made, it was made by the informer or by Miss Robinson.

At the beginning of Agent's Casale's testimony, counsel for the defendant requested production of the informer (50-51 R). Agent Casale testified that the informer was

"intimately" known by the other agents but not by him (58 R). Counsel for the defendant made repeated requests for the production of this informant when every witness was presented by the government. The informant was not produced and, according to the agents who supposedly knew him "intimately" as an informer for almost five years (245 R), his last known whereabouts were unknown (249-250 R).

The good faith of the defendant in attempting to locate this essential witness was shown when, the night before trial, the defendant was seen by one of the agents at 332 W. 51st Street trying to locate the informer (197 R). Furthermore, the non-production of the informer created an impasse in the defendant's defense causing him to testify on his own behalf. (A situation, according to his trial counsel, which was not anticipated or desired) (284 R).

F. Reasons for Granting Writ

The burden for an accused to prepare a defense which this Court in *Roviaro* is so convincingly concerned with would be nothing more than a mockery if the government permitted an essential defense witness to remain outside the scope of its authority. The government must be made to show every effort and every technique employed by it in locating the informant if it rests on the position that the whereabouts of such person is unknown to it.

If Banks were as wealthy as the U.S. Government and had in his employ the amount of investigators that the U.S. Government employs, then the balance of power in a criminal case would be equal. Absent these factors we find a defendant relatively penniless pitted against the resources

of the federal government. The government must fulfill its obligation in equating its duty to prosecute with the prosecutor's duty to see that the accused is given a fair trial. *Berger* v. *U.S.*, 295 U.S. 78.

In *Draper* v. *Washington*, 372 U.S. 487, this Court extended the government's obligation to provide free transcripts. In *Gideon* v. *Wainwright*, 372 U.S. 335, the obligation was extended to provide free counsel. The next obvious extension is to make available for the defendant witnesses which are necessary.

CONCLUSION

The petition for certiorari should be granted and this Court in the exercise of its power should order the judgment of conviction of the petitioner reversed and a new trial ordered with specific instructions for the government to produce certain witnesses.

Respectfully submitted,

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APPENDIX A

Excerpts from Testimony

• • • • •

Mr. Samuels: The Government calls Joseph V. Casale.

(Joseph V. Casale, sworn as a witness.)

The Clerk: Your full name, sir.
The Witness: Joseph Vincent Casale.
The Clerk: You may be seated.

• • • • •

Mr. Fusco: I am going to make a request, Judge, that this fellow Lord be produced, or the informant, as Your Honor suggested, and also I haven't gone that far as to whether he knew this other female Robinson, but at least at this moment here I am going to make a request upon the Assistant to produce Mr. Lord for me because I cannot proceed with a full defense of Mr. Banks unless Mr. Lord is produced, because it is my contention that if this gentleman got any narcotics, he got it from Lord and not from my client.

The Court: In the first place, there is a certain lack of clarity as to whether a man named Lord is the same person that the witness has referred to as the informant. I don't know. Lord and Lloyd sound something alike, but whether it is the same man, I don't know.

Let's call him the informant. You want the Government to produce him?

Mr. Fusco: I haven't been able to locate him.

The Court: Is the Government in a position to locate him? Do you know where he is?

Mr. Samuels: No, Your Honor, I make this representation to the Court.

Pursuant to my instructions, Agent Fluhr, whose informant it was actually, and Agent Manning, have attempted to locate the informant on eight occasions, the most recent being last night.

The informant, to the best of my knowledge, is not under indictment in the Federal Court. The last time that Agent Fluhr has heard from him was in March of this year, and I know he was getting paid by the case.

Agent Fluhr never had his own home phone number or knew where to contact him by going to a street corner or something of that nature.

As far as I know, this informer used to call Agent Fluhr.

To the best of the Government's knowledge, Your Honor, that is the state—I also point out that the Government feels that the production of the informant, according to Mr. Fusco's defense, will just go to prove something he doesn't have to prove and certainly is not material in this case.

* * * * *

Q. I draw your attention, if I may, Agent Casale, to November 14, 1963.

Before I do that, have you in the past two or three weeks attempted to locate the informant in this case? A. I have not, sir, no.

Q. Do you know of anyone who has? A. Yes. I have been told, sir, that the agents that were intimately connected with the informant have made various attempts to locate him.

• • • • •

Q. You arrived at the Hotel Dorado at 6:25 p.m., is that right? A. Yes, sir.

Q. Was the informant with you? A. He accompanied me to the Hotel Dorado.

• • • • •

Q. However, he was there November 14th, true? A. Yes.

Q. He was there November 21st, true? A. Yes, sir.

• • • • •

Q. Do you know how long the defendant, Paul Banks, was in this room, the Hotel Dorado, while you were there? A. No more than five minutes.

Q. Was the informant present at the time, during these five minutes? A. While I was there, yes, sir.

Q. He was there? A. Yes.

• • • • •

Q. You remained there for how long? A. Ninety seconds, two minutes. As long as it takes to pass money and junk.

• • • • •

ROBERT C. MANNING, having first been duly sworn, testified as follows:

• • • • •

Cross Examination by Mr. Fusco:

• • • • •

Q. By the way, yesterday did you have occasion to visit 332 West 51st Street? A. Yes, sir.

Q. Did you meet Paul Banks there? A. Yes, sir.

• • • • •

Q. Did you determine from looking at the record whether this informant Lloyd Cryder resided at 332 West 51st Street on November 21st, 1963? A. No.

• • • • •

ARTHUR J. FLUHR, having first been duly sworn, testified as follows:

• • • • •

Cross Examination by Mr. Fusco:

• • • • •

Q. How long have you known Crider? A. I would say roughly 1959 or 1960.

• • • • •

Q. Have you had occasion to look for Lloyd Crider in the past month? A. Yes, sir, I have.

Q. Where have you looked for him? A. Just about every place. Since last week sometime, I have been looking for Lloyd Crider, and I have looked for him on Broadway, I would say between 42nd Street and 145th Street, in various spots that over the past years I have known him to frequent.

Q. When did he last work as a special employee for you? A. I really can't recall.

Q. Was it this year? A. I believe it was last year.

Q. Don't you have records as to when a special employee works, the days, months and years, don't you keep such records? A. No, sir. The special employees could call you up every day of the year, but that doesn't mean that he is working every day of the year. That doesn't mean he is not working every day of the year.

Q. When he works don't you make some kind of a record? A. When he is being paid, yes, sir.

Q. When he works he gets paid, isn't that right? A. Not all the time, no.

Q. Assuming he is paid, there is a date on the voucher, isn't that right? A. That's correct, yes.

Q. Do you know when this special employee was last paid? A. In November.

Q. Of 1963? A. Of 1963.

* * * * * *

Q. In attempting to locate Lloyd Crider have you checked with the New York City Police Officers? A. Not the New York City Police Officers, no.

Q. Have you checked with the FBI records? A. No, sir.
Q. Fingerprint records? A. No, sir.

• • • • •

Q. Can't you check that out with your own department, the FBI in Washington, as to any fingerprint record? Can't you do that? A. Yes, sir, I can do that.
Q. Did you do it? A. No, sir, I did not.

• • • • •

Q. Do you know where we can locate Lloyd Crider? Do you? A. I have absolutely no idea.
Q. And this is after he worked for you for approximately five years, is that right? A. On and off, yes, sir.

The Court: I will sustain the objection to that.

• • • • •

Mr. Fusco: The fact remains, Judge, if the informant had been produced here I would not be putting the defendant on the stand, and his failure in being produced has constrained me now to put the defendant on the stand.

The Court: Does the Government know where the informant is?

Mr. Samuel: No, Your Honor.

The Court: And we have had testimony to the effect that efforts have been made to find him.

I have no reason to doubt the accuracy of Mr. Samuels' representation that the Government does

not know where he is and is not in a position to produce him.

Under those circumstances, there is nothing I can do about the informant. As I said before, you must decide whether to put him on the stand or not.

Mr. Fusco: I placed my position on the record.

• • • • •

Mr. Fusco: Paul Banks.

• • • • •

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 153

PAUL BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals was affirmed without opinion (R. 33a).

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1965 (R. 33a). The petition for a writ of certiorari was filed on May 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government has an absolute obligation to produce as a witness an informer whose identity has been disclosed but who cannot be found after a diligent search.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on two counts of an indictment charging narcotics sales in violation of 21 U.S.C. 173 and 174 (R. 1a-2a). On appeal the conviction was affirmed (R. 33a).

The principal government witness was narcotic agent Casale who testified that petitioner sold him narcotics on November 14 and November 21, 1963. An informant, Lloyd Crider, was present (R. 5a-6a). At the beginning of Casale's testimony, petitioner's counsel requested production of the informer, stating that if Casale obtained any narcotics he got them from the informer, not from the petitioner (R. 4a). The government attorney represented to the court that the government did not know where the informer could be located; that agents Fluhr and Manning had attempted to locate the informer on eight occasions, the most recent being the previous night; that Fluhr had heard from the informer in March 1964; that Fluhr did not have the informer's home telephone number and that, as the attorney understood it, the informer used to call Fluhr (R. 4a-5a). Casale testified that he had been told that the agents intimately connected with the informer had made various attempts to locate him (R. 5a).

Agent Fluhr testified that during the preceding week he had been looking for the informer on Broadway between 42nd Street and 145th Street in various places he had known him to frequent (R. 7a). The agent had no idea where the informer could be located. Fluhr testified that he had not checked with the F.B.I. for fingerprints or with New York City police officers (R. 8a).

The following colloquy occurred (R. 8a-9a):

> Mr. Fusco (petitioner's attorney): The fact remains, Judge, if the informant had been produced here I would not be putting the defendant on the stand, and his failure in being produced has constrained me now to put the defendant on the stand.
>
> The Court: Does the Government know where the informant is?
>
> Mr. Samuels (government attorney): No, Your Honor.
>
> The Court: And we have had testimony to the effect that efforts have been made to find him.
>
> I have no reason to doubt the accuracy of Mr. Samuels' representation that the Government does not know where he is and is not in a position to produce him.
>
> Under those circumstances, there is nothing I can do about the informant. As I said before, you must decide whether to put him on the stand or not.

Petitioner then took the stand to deny that he had made the narcotics sales charged.

ARGUMENT

Although required to give such information of the informer's whereabouts as it has, and to extend reasonable cooperation in securing his appearance, the government has no absolute obligation to produce the informer as a witness, as petitioner contends. *United States* v. *Cimino*, 321 F. 2d 509, 512 (C.A. 2), certiorari denied, 375 U.S. 974; *United States* v. *D'Angiolillo*, 340 F. 2d 453, 455-456 (C.A. 2), certiorari denied, 380 U.S. 955; *United States* v. *Miguel*, 340 F. 2d 812, 815 (C.A. 2); *United States* v. *Simmons*, 338 F. 2d 804, 806 (C.A. 2); *Williams* v. *United States*, 273 F. 2d 781, 795-796 (C.A. 9), certiorari denied, 362 U.S. 951; *Eberhart* v. *United States*, 262 F. 2d 421, 422 (C.A. 9). *Roviaro* v. *United States*, 353 U.S. 53, requires only that the government identify its informer, which was done here.

The government agents checked at places frequented by the informer on at least eight occasions, but were unable to find him. The fact that the F.B.I. and New York City police records were not searched is not of controlling importance; there was no showing that these would have disclosed an accurate address for reaching the informer. Petitioner made no motion for a continuance to permit inspection of such records, nor did he suggest any procedure under which a further search could be made. The record shows that after a diligent search by both the government and the petitioner himself, the informer could not be found. Under these circumstances the

trial court properly ruled that the government was under no absolute obligation to produce the informer.

Petitioner was not coerced into taking the stand by reason of non-production of the informer. His counsel made this decision as a matter of trial strategy, as would be necessary in any other case where he considered it advantageous that an accused should testify.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1965.

END